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No. 86-47

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNIGLASS INDUSTRIES, A DIVISION OF UNITED MERCHANTS AND MANUFACTURERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board
Washington, D.C. 20570

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Petitioner contends that the statute of limitations bars the Board's finding that petitioner violated the National Labor Relations Act by refusing to rehire three employees because of their protected activities.

1. In 1980, employees at petitioner's plant in Statesville, North Carolina, began a union organizing campaign that culminated in a Board-conducted election which the union lost. Employees Charles and Jeanette Pegram and Elaine Honeycutt were active in the union campaign. Pet. App. A9-A10. Early in 1981, the Board conducted a hearing on charges that petitioner committed unfair labor practices during that campaign. Elaine Honeycutt and Charles Pegram testified as witnesses for the General Counsel at that hearing (*id.* at A9). Prior to the hearing, Elaine Honeycutt was warned by her father (a supervisor employed by

petitioner) that she would lose her job if she testified. On several subsequent occasions Honeycutt's father rebuked her for testifying and again warned her that she would lose her job. *Id.* at A13.

In early 1982, petitioner laid off and subsequently terminated the Pegrams and Elaine Honeycutt (Pet. App. A11, A16-A17).[1] Following their terminations, the three employees applied for reemployment, updating their applications in each successive month. *Id.* at A11, A17. Beginning in January and February 1983, and continuing over the next several months, petitioner recalled laid off employees and hired new employees (*id.* at A11-A12, A17). It did not, however, rehire Elaine Honeycutt and the Pegrams to fill available positions for which they were qualified (*id.* at A15, A17-A18).

In June 1983, Elaine Honeycutt asked petitioner's assistant industrial relations director why she had not been rehired. Honeycutt was told that she was ineligible for employment under petitioner's anti-nepotism rule, a long-dormant policy that had been revived on March 1, 1983 (Pet. App. A12).

On September 18, 1983, Jeanette Pegram's brother, Ralph Clanton, asked Supervisor Rayford Clanton (another brother) when petitioner was going to rehire the Pegrams. Supervisor Clanton replied that he could not help them, adding that if the Pegrams " '[had] not shown their asses by trying to organize that stupid union they might still have been' " employed at the plant (Pet. App. A18-A19). On October 12, 1983, when the Pegrams again updated their employment applications, petitioner's Industrial Relations Director informed them that they were wasting their time

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[1]Under company policy, six months after an employee is laid off he is regarded as terminated.

because petitioner had reinstated its policy of not hiring relatives of supervisors (*id.* at A17).[2]

2. The Board, upholding the decision of the administrative law judge, found that petitioner violated Section 8(a)(4), (3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(4), (3) and (1), by refusing to rehire Elaine Honeycutt and Charles Pegram in retaliation for their testimony at a Board hearing and their union activities and violated Section 8(a)(3) and (1) by refusing to rehire Jeanette Pegram in retaliation for her union activities (Pet. App. A32).[3]

In finding that petitioner unlawfully refused to rehire the three employees, the Board rejected petitioner's defense that its actions were based on a neutral application of the anti-nepotism rule.[4] The Board found that the anti-nepotism rule was reimplemented in March 1983 to avoid hiring union adherents who were related to management personnel (Pet. App. A17-A32). The Board also rejected petitioner's contention (*id.* at A23) that the charges were time-barred by Section 10(b) of the Act, 29 U.S.C. 160(b).[5] Petitioner argued that since the anti-nepotism rule was

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[2]Two of Jeanette Pegram's brothers were supervisors (Pet. App. A17).

[3]The Board also found that petitioner had unlawfully discharged another employee, Jeffrey Smith, and had unlawfully warned employees that participation in protected activities could lead to discharge or preclude rehire (Pet. App. A21, A38-A40). The court of appeals upheld these findings and petitioner does not contest them in this Court.

[4]It was not alleged that the initial layoff decisions were discriminatory and the Board did not find that it was discriminatory for petitioner to recall other employees instead of these three employees prior to reviving the anti-nepotism rule (Pet. App. A11, A15-A18).

[5]Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board."

instituted on March 1, 1983, more than six months before the filing of the charge, its actions implementing that rule could not be found to be unlawful. The Board explained, however, that "the 6-month period of limitations prior to filing the charge * * * runs from the time that Honeycutt and the Pegrams were put on notice, actual or constructive, that they were not subject to rehire" (Pet. App. A24).

3. The court of appeals, in an unpublished order, upheld the Board's decision (Pet. App. A1-A4). The court found that substantial evidence supported the Board's finding that petitioner refused to rehire Honeycutt and the Pegrams because of their protected activities (*id.* at A3-A4). The court further agreed with the Board that the finding of those violations was not time-barred because "[u]nder the Act, the six-month limitation period 'does not begin to run until the aggrieved party knew or should have known that his statutory rights were violated' " (*id.* at A3).

4. Petitioner does not dispute the Board's findings, upheld by the court of appeals, that it refused to rehire the employees because of their support for the union. Petitioner argues only that the statute of limitations barred that finding. There is no merit to petitioner's contention, and it raises no issue warranting review by this Court.

Petitioner has no quarrel with the governing legal standard; it concedes (Pet. 20) that the six-month limitation period of Section 10(b) " 'does not begin to run until the aggrieved party knew or should have known that his statutory rights were violated.' " *Metromedia, Inc.* v. *NLRB*, 586 F.2d 1182, 1189 (8th Cir. 1978) (citation omitted). Petitioner challenges only the application of that settled rule to the facts of this case. Thus, because petitioner regards the revival of the anti-nepotism rule as the unfair labor practice found by the Board and because that action preceded the statutory period, petitioner contends that Section 10(b) poses an absolute bar.

That contention has no merit. The violation found by the Board was *not* reimplementation of the anti-nepotism rule.[6] Petitioner raised the anti-nepotism rule as an affirmative defense to the allegation that the refusal to rehire was unlawfully motivated. Accordingly, Section 10(b) did not bar the Board from considering and rejecting the anti-nepotism rule as a legitimate basis for its refusal to rehire, or from deriving support for its finding of unlawful motivation from the rule. *Local Lodge No. 1424* v. *NLRB (Bryan Manufacturing Company)*, 362 U.S. 411, 416 (1960), makes clear that Section 10(b) does not preclude the Board from relying on "earlier events [to] shed light on the true character of matters occurring within the limitations period."[7]

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[6]Even if the Board had found reimplementation of the anti-nepotism rule to be the predicate unlawful conduct, the three employees were not informed of petitioner's revival of that rule until months after its implementation and well within the six-month limitation period. Accordingly, even under petitioner's misreading of the Board's decision, the charge was timely.

Petitioner also contends (Pet. 19-22) that tolling of the statute of limitations is inappropriate here because the Pegrams and Honeycutt should have filed charges when they were not offered jobs in January 1983. That factual contention does not warrant review by this Court. In any event, it is without merit. Prior to the time petitioner informed the three employees that the anti-nepotism policy made them ineligible for rehire the employees were regularly updating their applications for employment—with petitioner's knowledge—without receiving any indication from petitioner that they would not be considered for employment. The fact that other individuals were hired for positions the three employees previously held clearly did not put them on notice that they could not be rehired. Indeed, as noted, *supra*, n.4, the Board did not find it unlawful for petitioner to select other applicants for openings that occurred prior to revitalizing the anti-nepotism rule.

[7]In *Bryan Manufacturing Company*, 362 U.S. at 417-419, the Board found that enforcement of the union shop clause of a collective bargaining agreement was an unfair labor practice because the union did not represent a majority of the employees at the time the contract was executed, almost a year prior to the filing of a charge. The Court held,

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board

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however, that the complaint was barred by Section 10(b) because enforcement of the clause—the only event occurring within the 10(b) period—derived its unlawfulness solely from the unlawful execution of the contract with a minority union, an event that antedated the Section 10(b) period. Here, on the other hand, petitioner's discriminatory refusal within the Section 10(b) period to rehire the three employees was the unlawful act; the anti-nepotism rule was considered merely in assessing petitioner's defense.

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